IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.601 OF 2006

M/s. K.G. Kapadia & Co.
having its office 109,
209 Sumer Kendra
Pandurang Budhkar Marg,
Worli, Mumbai - 400 018 .. Petitioner.
V/s.
Lalit S. Sangle,
Income-tax Officer 11(2)(4),
Aayakar Bhavan, Maharshi
Karve Road, Mumbai - 20
& Others .. Respondents.

Mr.Percy Pardiwalla with Ms.Vasanti B. Patel for the petitioner.

Mr.A.S. Rao for the respondents.

CORAM : R.M. LODHA &
J.P. DEVADHAR, JJ.

DATED : 7TH MARCH, 2006.

P.C. :

1. Heard.

2. Rule. Rule returnable forthwith.

3. Heard finally at this stage.

4. On 13th April, 2005, notice under Section 148 of the Income Tax Act, 1961 was issued to the petitioner. The notice reads thus :

> "NOTICE UNDER SECTION 148 OF THE INCOME TAX ACT, 1961
>
> P.N.NO.AAAFK4766F Office of the

Date : 13/04/05

To,

M/s.K.G. Kapadia & Co.
109/209, Sumer Kendra
Pandurang Budhkar Marg,
Worli, Mumbai - 400 018.

Sir/Madam,

Whereas I have reason to believe that your income chargeable to tax for the assessment year 2003-04 has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961.

I, therefore, propose to assess/re-assess/ re-compute/loss depreciation allowance for the said assessment year and I hereby require you to deliver to me within 30 days from the date of service of this notice, a return in the prescribed form of your income for the said assessment year.

This notice is being issued after obtaining the necessary satisfaction of the Commissioner of Income Tax.

sd/-
(Signature of Officer)
Name.SUDHANSHNU GUPTA
Designation. Income-tax Officer 11(2)(4), Mumbai."

5. The petitioner sought reasons for re-opening the assessment. By communication dated 29th August, 2005, the petitioner was informed the reasons for re-opening, thus :

"The notice u/s.148 of the Income Tax Act, 1961 was issued as the exemption claimed u/s.54EC was wrong and was not in order and I have reason to believe that income chargeable to tax has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961."

6. The petitioner responded to the said notice by filing reply, thus :

> "With reference to the income-tax assessment of our above clients for the above assessment year and further to the letter dated 29th August, 2005 stating the reasons recorded for re-opening of the assessment pursuant to our letter dated 18th May, 2005, we are instructed by our clients to state as under :
>
> " In the said letter, the reasons recorded for re-opening the assessment have been furnished as follows :
>
> > "The notice u/s.148 of the Income Tax Act, 1961 was issued as the exemption claimed u/s.54EC was wrong and was not in order and I have reason to believe that income chargeable to tax has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961."
>
> At the outset, it is submitted that the provisions of section 147 are not attracted at all and there is no jurisdiction whatsoever for reopening of the concluded assessment as no income chargeable to tax has escaped assessment as alleged.
>
> In the said reasons, it is submitted that the exemption claimed under section 54EC was not in order and hence the belief has been found that income chargeable to tax has escaped assessment and accordingly, notice under section 148 dated 13th April, 2005 was issued to our clients.
>
> In this connection, our clients invite your attention to the note to computation of total income submitted alongwith the original return of income.
>
> > "During the previous year relevant to the assessment year 2003-04, office premises located at Nilkanth Plaza, Andheri, Mumbai were sold for an amount of Rs.63,00,000/-. In the

previous year relevant to assessment year 1995-96, we had sold the office premises situated at Maker Chamber III, for Rs.2,27,33,611/-. Further in the said assessment year, we had brought inter-alia the aforesaid office premises at Nilkanth Plaza at Andheri for an amount of Rs.37,84,000/- which was off set against the said proceeds. Accordingly, no depreciation was claimed or allowed in respect of the said office premises at Nilkanth Plaza.

It may be noted that since no depreciation in respect of the said office premises located at Andheri has been claimed, the gain arising on the transfer thereof is liable to tax as long-term capital gains. However, we have invested the aforesaid amount of Rs.63,00,000/- in bonds specified under section 54EC as given below and accordingly, no capital gains have been offered to tax in the return of income for assessment year 2003-04.

Sr. No.	Particulars	Date of Investment	Amount (Rs.)
1.	6% National Housing Bank Capital Gains Bonds, 2002.	30-Nov.2002	21,00,000
2.	Non-convertible Redeemable Taxable Bonds of Rural electrification Corporation Limited.	25-Nov-2002	21,00,000
3.	Non-convertible Redeemable Taxable Bonds of National Highway Authority of India.	30-Nov.2002	21,00,000
	Total		63,00,000"

The said claim was made relying on the decision of the Mumbai, Tribunal in the case of Ace Builders (P) Ltd. vs. ACIT (71TTJ 188) and the decision of the Gauhati

> High Court in the case of CIT v. Assam Petroleum Industries P. Ltd. (262 ITR 587). The said decision of the Tribunal has been approved by the Bombay High Court and our clients invite your attention to the decision of the Bombay High Court in the case of Ace Builders Pvt. Ltd. dated 7th March, 2005 wherein the Bombay High Court has decided the issue whether the assessee is entitled to deduction under section 54E in respect of capital gains arising on transfer of the capital asset on which depreciation has been allowed and which is deemed as short term capital gains under section 50 of the Income-tax Act, 1961 in favour of the assessee and against the revenue.
>
> It is, accordingly, submitted that on the date of recording of reasons, the said decision of the Bombay High Court was already available and hence there could be no belief that any income chargeable to tax has escaped assessment.
>
> In view of the above facts, it is submitted that the proceedings initiated under section 147 of the Act are bad in law and the notice issued under section 147 ought to be quashed as null and void.
>
> Our clients request you to kindly dispose of this application objecting to the re-opening of the assessment by passing a speaking order. Without prejudice to the above and in the alternative, in case the order under section 148 is to be passed without disposing of this application, then our clients request you to kindly give them an opportunity to give their submissions in respect of the aforesaid issues on merits."

7. The concerned assessing officer after receipt of the reply / objections from the petitioner sent a communication to the petitioner on 16th February, 2006 intimating him that the re-assessment proceedings shall proceed and that the effect of the decision of the Bombay High Court in Income Tax

Appeal No.1006 of 2000 [The CIT Mumbai City-II Vs. Ace Builders Pvt.Ltd.] shall be considered while completing the assessment. The communication dated 16th February, 2006 reads thus :

> "I have taken into account your contention about the validity of reopening of assessment proceedings. I have reapplied my mind to the facts and circumstances of the case. As already intimated, assessment proceedings were reopened on the premise that exemption u/s.54EC, though not due, was allowed. While reopening the assessment, it is noticed that the A.O. has kept in view that the property transferred formed part of Block of Assessments. This fact can not be denied.
>
> In the back drop of the above, while forming an opinion for income escaping assessment, please note that the Assessing Officer did have material before him. Therefore, the assessment will be proceeded with and your co-operation in the matter is solicited.
>
> As regards the decision relied upon by you in Income Tax Appeal No.1006 of 2000 of Hon'ble Bombay High Court, in the case of The CIT Mumbai City-II Vs. Ace Builders Pvt. Ltd., no doubt, the Hon'ble Court has held that exemption u/s.54E is admissible even in a case of transfer brought within the purview of section 50. The applicability of ratio of the above decision will duly be considered while completing the assessment."

8. In our considered view, the matter requires to be reconsidered by the assessing officer before proceeding with the reopening of the assessment proceedings. He must record a categorical opinion as to whether the judgment of this Court in Income Tax Appeal No.1006 of 2000 in the case of the CIT Mumbai

City-II Vs. Ace Builders Pvt.Ltd. is applicable to the facts of the present case or not.

9. We, accordingly, quash and set aside the communication dated 16th February, 2006 and remit the matter back to the assessing officer for reconsideration as to whether the assessment proceedings for assessment year 2003-04 needs to be reopened. The assessing officer shall form an opinion about the applicability of the decision of this Court in Income Tax Appeal No.1006 of 2000 in the case of CIT Mumbai City-II V/s. Ace Builders Pvt.Ltd. before directing re-opening of the assessment proceedings for assessment year 2003-04.

10. The writ petition stands disposed of. Rule is made absolute in aforesaid terms. No costs.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)